(3)

No. 88-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DENZIL PRITCHARD, ET UX.,

Appellants,

v.

BOARD OF COMMISSIONERS OF CALVERT COUNTY, MARYLAND, ET AL.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS
AND
MOTION TO AFFIRM

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The Board of Commissioners of Calvert County, et al, appellees, respectfully move that this Honorable Court dismiss the appeal of Denzil Pritchard, et ux, or in the alternative, that the decision of the Court of Appeals of Maryland be affirmed, for reasons as follows:

1. The subject appeal raises issues that were not argued or decided below at any level.

2. The appeal raises issues that do not present substantial federal questions.

3. The appeal raises issues that were raised by the appellants in Federal Court and dismissed by order of the United States District Court

for the District of Maryland (Denzil Pritchard and Elizabeth Pritchard v. Calvert County Board of County Commissioners, et al, Civil No. N-86-1258) on December 7, 1987; appeal to the Fourth Circuit withdrawn by appellant's own Motion by order of that Court (Denzil Pritchard, et ux v. Calvert Co. Board of Commissioners, et al., No. 88-2024). Orders attached as Appendix 1 and 2.)

4. The ordinance provision at issue in this case may be construed, as it was below, in a way that does not offend the Constitution.

ARGUMENT

If this case were indeed as the appellant has presented, there might be some questions worthy of this Court's consideration. An examination

of the realities, however, demonstrates otherwise.

The facts relevant to this appeal are really very simple. In 1984, after notice and public hearing, Calvert County adopted a new comprehensive zoning ordinance. It was effective on May 9, 1984 for most properties. For holders of Rural Commercial properties outside Town Centers, however, a two-year grace period was given before a downzone provided by the Ordinance took effect. Under §7-4.02B of the Ordinance, after two years from adoption those Rural Commercial properties with an approved site plan would be allowed an additional two years to complete construction; all others would automa-

tically be downzoned consistent with the zoning in the area. That zoning was established by the zoning maps adopted as part of the comprehensive rezoning.

The appellants here owned one of these Rural Commercial parcels. On May 7, 1986, the day before the grace period ended, they submitted a site plan approval application identical to one that had already been submitted by a contract purchaser and rejected by the Calvert County Planning Commission five months earlier. At its next regularly scheduled meeting, May 21, 1986, the Planning Commission rejected the application because the property's commercial zoning had expired on May 8th and the use proposed was not permitted under the new

zoning classification. Nowhere in this simple scenario do any substantial Federal questions appear. Rather, all issues may be disposed of on non-Constitutional grounds, particularly in light of the strong presumption in favor of the constitutionality of legislation.

1. The appellants argue that their property rights were extinguished when their land was reclassified without a hearing to determine what zoning was consistent with the surrounding area. Nowhere was this issue raised below, as the Court of Appeals noted in footnote 4 of its opinion, and appeal based on this issue should thus be dismissed.

In any event, the appellants are incorrect on their assertions

regarding this issue. There was, indeed, a hearing on the matter of downzone, because it was implemented as part of the comprehensive rezoning. Nor was there an issue of what the new zoning would be, since it was shown on the official zoning map. As for the appellants' contention (at page 27 of their Jurisdictional Statement) that "part of the surrounding area, as noted by the Court of Appeals in footnote 2 of its opinion, had an approved site plan." Far from being "surrounding area", that land was the very same parcel at issue here, for which the appellants had an approved site plan which they abandoned.

2. The appellants assert that this Court has yet to consider whether there can be a property right in a

zoning classification. In fact, it is well settled that the states, through their police power, may regulate and change zoning classifications. There is no substantial question to be resolved. Even if there were, the facts in the case at bar would not make this a likely case for resolution of such issues.

As part of a comprehensive rezoning, the downzone here was accomplished with proper procedure in accordance with the state statutes controlling zoning, as properly interpreted and applied by the Court of Appeals. The downzone, as noted, was the product of a comprehensive legislative rezoning, with notice and hearing. The appellants were no more entitled to a hearing on their indivi-

dual downzoning, when it took effect two years after the ordinance adoption, than they would have been for a downzone that took effect two days after ordinance adoption.

3. The appellants assert an Equal Protection claim under the authority of Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982). Logan, however, does not provide such authority, as the equal protection question was not a basis for decision. Even if it did, the classification in Logan was one over which the claimant could exercise no control. In the case at bar, there is no question of failure or refusal of the County to act in due course. The classification here was made by the applicants, not

the government. Those applicants who allowed a reasonable period of time for review received action. Those who allowed only one day did not. Appellants can point to no application submitted more than a month before expiration of the grace period that was not acted upon.

A rational basis for any alleged classification here can easily be found, as it was by the Court of Appeals. If this Court wishes to reconsider or elaborate on its well established standards of equal protection, this case does not present appropriate facts on which to do so.

4. Finally, the appellants urge that this case presents issues of deprivation of statutory entitlements above and beyond any property interest

in zoning classifications, again citing Logan, supra. But in Logan, the statutorily created property interest was one requiring a hearing for determination of adjudicative facts. Here, any "property" was created and defined by legislation, with definite termination date. There were no adjudicative facts to be ascertained, and again no substantial Constitutional question is raised.

CONCLUSION

The Court of Appeals properly construed the ordinance at issue in this case in a manner consistent with the Constitution of the United States. This appeal presents no questions to this Court which are not well settled, nor do the facts of this case sustain

any issues of Constitutional significance. Further, issues have been raised on appeal that were not presented below.

WHEREFORE, the appellee prays:

1. That this appeal be dismissed; and/or

2. That the decision of the Maryland Court of Appeals be affirmed.

Respectfully submitted,

HANDEN AND KRUG
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Prince Frederick,
Maryland 20678
(301)535-0499

BY: Warren John Krug

Allen S. Handen

Mary Maddox Krug
Attorneys for
Appellees

CERTIFICATE OF SERVICE

I, Warren John Krug, hereby certify that as a duly admitted member of the Bar of the Supreme Court of the United States that on this 8th day of September 1988, pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, I did serve three (3) copies of this Motion to Dismiss and Motion to Affirm by first class mail, postage prepaid, on Gary A. Goldstein and Charles E. Haller, Goldstein and Sher, P.A., 1709 Charles Center South, 36 South Charles Street, Baltimore, MD 21201, attorneys of record for Denzil and Elizabeth Pritchard, appellants.

Warren John Krug

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DENZIL PRITCHARD, ET UX.	*	
Plaintiff	*	
v.	*	Case No.: 88-2024
CALVERT COUNTY BOARD OF COMMISSIONERS, ET AL.	*	
Defendant	*	

* * * * * * * * * * * * *

LINE TO DISMISS APPEAL

Comes now Denzil Pritchard, et ux., by and through their attorneys, Goldstein and Sher, P.A. and Gary A. Goldstein and Charles E. Haller, and hereby dismiss the within appeal.

GOLDSTEIN AND SHER, P.A.

Gary A. Goldstein

Charles E. Haller

Charles E. Haller
1709 Charles Center South
36 South Charles Street
Baltimore, Maryand 21201
(301) 727-5400

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 1988, a copy of the aforegoing Line to Dismiss Appeal was mailed first class mail, postage prepaid, to Allen S. Handen, P. O. Box 1130, Prince Frederick, Maryland 20678.

Charles E. Haller

CEH:DCW:F
16031.002:04/07/88

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DENZIL PRITCHARD and ELIZABETH PRITCHARD :

v. : Civil No. N-86-1258

CALVERT COUNTY BOARD OF COUNTY COMMISSIONERS, et al. :

ORDER

In accordance with the foregoing Memorandum, IT IS this 7th day of December 1987, by the United States District Court for the District of Maryland, ORDERED;

1. That Magistrate Chasanow's Report and Recommendation BE, and the same hereby IS, AFFIRMED and ADOPTED;

2. That defendants' Motion to Dismiss all counts BE and the same hereby IS GRANTED;

3. That judgment BE, and the same hereby IS, entered in favor of the defendants and against the plaintiffs; and

4. That the Clerk of Court shall send copies of this Memorandum and Order to counsel in this case.

Edward S. Northrop
Senior United States District Judge